Wal-Mart Stores, Inc. and United Food And Commercial Workers Local Union 1000. Case 17–CA–21045–1

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On August 27, 2001, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, the Charging Party filed a cross-exception and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions, as well as a cross-exception and a supporting brief joining the Charging Party's cross-exception. The Respondent filed an answering brief to the cross-exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified here, and to adopt the recommended Order as modified.[2]

This case presents three unfair labor practice issues involving Wal-Mart associate[3] and union proponent Brian Shieldnight. For the reasons discussed below, we agree with the judge that the Respondent violated Section 8(a)(1) of the Act when it removed Shieldnight from its property because he wore a T-shirt with a union-related message during an off-duty visit to the Respondent's store. We also agree with the judge that the Respondent violated Section 8(a)(3) and (1) by issuing Shieldnight a written "coaching" based, in part, on his wearing of the T-shirt. Contrary to the judge, however, we find that the coaching was also unlawful to the extent that it was based on Shieldnight's on-duty invitations to three co-workers to attend a union meeting. We therefore find that Shieldnight did not engage in conduct that was lawfully subject to the Respondent's no-solicitation rule in either instance for which he was disciplined.[4] Finally, contrary to the judge, we find that the Respondent did not violate Section 8(a)(1) by allegedly soliciting grievances from Shieldnight and promising to remedy them in order to discourage him from supporting the Union.[5]

I. BACKGROUND

The Respondent operates retail stores throughout the United States, including the Tahlequah, Oklahoma store involved in this case. At all material times the Respondent maintained and enforced a no-solicitation rule providing, in relevant part, that associates may not engage in solicitation on behalf of any cause or organization during working time, or in selling areas during the hours the store is open to the public.

On January 29, 2001,[6] Shieldnight, an associate at the Tahlequah store who had recently contacted the Union about possible representation, went into the store while off duty. He wore a self-made T-shirt that read "Union Teamsters" on the front and "Sign a card . . . Ask me how" on the back.[7] Assistant Store Manager John Lamont and Assistant Night Manager Tammy Flute observed the message on Shieldnight's T-shirt and noticed that he was speaking to an associate working in the sporting goods department. Flute told the associate with whom Shieldnight was speaking to get back to work, and Lamont ordered Shieldnight to leave associates alone while they were working.

Lamont and Flute went to the management office. Lamont called the Respondent's "Union Hotline" to find out what further action could be taken in response to the situation. The hotline representative told Lamont that the message on Shieldnight's T-shirt was a form of solicitation in violation of the Respondent's no-solicitation rule and that Shieldnight should be removed from the store.

Lamont and Flute returned to the selling floor and found Shieldnight in the jewelry department talking to two friends who were not associates. Lamont informed Shieldnight that the message on his T-shirt was a form of solicitation and that he would have to leave the store immediately. Lamont then escorted Shieldnight to the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the judge's recommended Order to correspond to our decision herein. Further, in his recommended Order, the judge inadvertently referred to the date of the Respondent's first unfair labor practice as February 2, 2001. We have modified the recommended Order to reflect that the Respondent's first unfair labor practice was on January 29, 2001. Finally, we have substituted a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

[3] The Respondent refers to its employees as "associates."

[4] The validity of the rule is not at issue.

[5] No exceptions were filed to the judge's other findings.

[6] All dates refer to 2001, unless otherwise noted.

[7] It is unclear from the record why Shieldnight wore a T-shirt promoting the Teamsters Union when the Food and Commercial Workers Union (Union) was attempting to organize at the Respondent's store.

front door of the store and instructed him not only to leave the store, but also to leave the Respondent's property.

On January 30, Shieldnight, while on duty, invited Department Manager Debra Starr and associates Patricia Scott and James Parsons, who were also on duty, to a union meeting that night. Shieldnight asked Starr to come to the meeting and stated that he would like her to consider the Union and to sign a union authorization card. Shieldnight asked Scott and Parsons to attend the meeting so that they could "hear the other side of the story." Starr, Scott, and Parsons gave statements to store management regarding their discussions with Shieldnight.

Based on the T-shirt incident on January 29 and Shieldnight's conversations with Starr, Scott, and Parsons on January 30, Co-manager Rick Hawkins decided to give Shieldnight a written "coaching" for violating the Respondent's no-solicitation rule.[8] On January 31, Lamont and Hawkins met with Shieldnight to conduct the coaching session.

After Lamont reviewed the reasons for the coaching with Shieldnight and gave him the coaching, the trio discussed various work-related issues for about 45 minutes. During this discussion, Shieldnight asked Lamont and Hawkins numerous questions and raised several concerns with them regarding the Respondent's employment policies. Lamont and Hawkins answered Shieldnight's questions and listened to his concerns in accordance with the Respondent's "open door" policy, which encourages associates to discuss ideas, problems, and concerns with their supervisor or any other member of management.

After this discussion had gone on for some time, Lamont asked Shieldnight what some of the issues were that could be resolved for him. Among other issues, Shieldnight said he thought the that Respondent should pay for medical insurance for all associates. Lamont suggested that Shieldnight bring the matter up at one of the Respondent's upcoming "grass roots" meetings, through which all of the Respondent's stores identify their top three issues of concern and the Respondent tries to address the top three issues identified on a company-wide basis. Finally, after about an hour, Lamont and Hawkins ended the meeting and instructed Shieldnight to return to work. The three men set up a time to meet again in the future. However, a subsequent meeting never occurred.

[8] The written "coaching" is level two of the Respondent's "coaching for improvement" disciplinary process. This is the first formally documented level of the process, and it is generally used when oral "coaching" has not been successful in correcting an associate's unacceptable behavior or performance. At the time of the written coaching, Shieldnight had previously been given a oral "coaching" by Regional Human Resource Manager Sylvester Johnson for circulating a letter asking that a former manager be returned to the store.

II. DISCUSSION

1. The judge found that the T-shirt Shieldnight wore into the Respondent's store did not constitute a form of solicitation subject to the Respondent's no-solicitation rule. Thus, the judge found that the Respondent violated Section 8(a)(1) by removing Shieldnight from its store and ordering him to leave its property because he wore the T-shirt.

The Respondent argues that the message on the T-shirt was not the equivalent of mere union insignia or propaganda, but was instead intended to attract employees to sign a union authorization card, and was, therefore, a form of solicitation legitimately prohibited by the no-solicitation rule. The Respondent thus contends that it was justified in enforcing this rule by removing Shieldnight from the store and by issuing him the coaching. We do not agree with the Respondent.[9]

It has long been recognized that employees have a statutory right to wear union insignia while on their employer's premises. In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 fn. 7 (1945), the Supreme Court noted with approval the Board's holding that "the right of employees to wear union insignia at work has long been recognized as a reasonable and legitimate form of union activity, and [an employer's] curtailment of that right is clearly violative of the Act," absent a showing of special circumstances. This protection extends to prounion T-shirts. *Aldworth Co.*, 338 NLRB No. 22, slip op. at 67 (2002); *The Broadway*, 267 NLRB 385, 404 (1983); *De Vilbiss Co.*, 102 NLRB 1317, 1321 (1953). Moreover, hortatory words in the insignia worn "do not destroy the essentially protected character of the insignia and convert such insignia into the kind of solicitation which is otherwise amenable to proper rules under proper circumstances. Most, if not all, insignia, union or otherwise, have certain propaganda effects, and the words 'vote' or 'join' on union insignia during a union campaign convey no additional ideas not implied in a button or T-shirt which contains only the union name." *De Vilbiss Co.*, supra at 1321–1322.

In the context of a union campaign, "'[s]olicitation' for a union usually means asking someone to join the union by signing his name to an authorization card." *W.W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), enfd. 582

[9] We note that the Respondent admits that it erred in telling Shieldnight he could not even remain on its property outside the store. In light of our finding that the Respondent unlawfully banned Shieldnight from remaining inside its store, we need not address the issue of whether it effectively repudiated its exclusion of Shieldnight from outside the store.

F.2d 1118 (7th Cir. 1978). However, an integral part of the solicitation process is the actual presentation of an authorization card to an employee for signature at that time. As defined, solicitation activity prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the individuals involved are supposed to be working. Solicitation is therefore subject to rules limiting it to nonworking time and, in the special circumstances of retail stores, to nonselling areas.

The message on Shieldnight's T-shirt— "Sign a card . . . Ask me how"—did not constitute this kind of solicitation. It did not "speak" directly to any specific individual or group of individuals and it did not call for an immediate response, as would an oral person-to-person invitation to accept or sign an authorization card. Moreover, there is no claim or evidence that Shieldnight did anything in furtherance of the T-shirt message on the evening in question. He merely walked around and socialized with associates and acquaintances about various nonunion matters. There is no claim or evidence that Shieldnight encouraged any associates with whom he spoke to sign an authorization card, that he offered them cards, or that he even had any cards with him at the time.

Under these circumstances, we find that Shieldnight's T-shirt must be treated as simply the wearing of union insignia. The Respondent therefore could not lawfully apply its no-solicitation rule to prohibit Shieldnight from wearing the T-shirt on its premises, absent a showing of special circumstances. [10] Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(1) by removing Shieldnight from its store because he was wearing the T-shirt.

2. In turn, we also agree with the judge that the Respondent could not lawfully rely on Shieldnight's wearing the T-shirt to justify giving him a written coaching, and that the coaching therefore violated Section 8(a)(3) and (1). However, we disagree with the judge's finding that Shieldnight's on-duty invitations to department manager Starr and associates Scott and Parsons to attend a union meeting, the other basis for the coaching, were prohibited by the Respondent's no-solicitation rule.

Once again, our analysis turns on the distinction between union solicitation and other employee activity in support of union organizing. "'[S]olicitation' for a union is not the same thing as *talking about a union or a union meeting* or whether a union is good or bad." [11] In recognition of this distinction, the Board found that an employee did not engage in conduct lawfully proscribed by no-solicitation rules when she merely asked a coworker if she had a union authorization card.[12] In another instance, the Board held that an employee's act of introducing a union representative to a coworker, and her subsequent statement that the coworker would go along with the union, did not constitute solicitation for which the employee could be disciplined under the employer's no-solicitation rule.[13]

Consistent with this precedent, we find that Shieldnight's invitations to Starr, Scott, and Parsons to attend a union meeting did not constitute conduct properly prohibited by the Respondent's no-solicitation rule, even though the invitations were extended during working time. In his conversations with Scott and Parsons, Shieldnight merely asked these individuals to attend a union meeting that evening. While Shieldnight did tell Starr that he would like her to sign an authorization card, there is no evidence that Shieldnight made any attempt to have Starr actually sign an authorization card at the time, or even that he had a card with him at the time of the conversation. In addition, although the three employees Shieldnight talked to indicated that they were on work time, there is no suggestion that their work was significantly interrupted.[14] The Board has found that simply informing another employee of an upcoming meeting or asking a brief, union-related question does not occupy enough time to be treated as a work interruption in most work settings.[15] Under these circumstances, Shieldnight's conversations with Starr, Scott, and Parsons did not rise to the level of solicitation, and the Respondent unlawfully applied its no-solicitation rule to this protected conduct in giving Shieldnight a coaching.

In sum, and contrary to our dissenting colleague, we find, for the reasons fully discussed above, that Shield-

[10] The Board has recognized that special circumstances, such as maintaining employee productivity and discipline and/or preventing the alienation of customers, may justify an employer's prohibition on the wearing of union insignia. See, e.g., *Kendall Co.*, 267 NLRB 963, 965 (1983); *Floridian Hotel of Tampa, Inc.*, 137 NLRB 1484, 1486 (1962), enfd. as modified 318 F.2d 545 (5th Cir. 1963). However, in this case, the Respondent has not alleged or adduced evidence that any such special circumstances existed.

[11] *W.W. Grainger*, supra at 166 (emphasis added).

[12] *Lamar Industrial Plastics*, 281 NLRB 511, 513 (1986).

[13] *Sahara-Tahoe Corp.*, 216 NLRB 1039, 1039 (1975), enfd. in relevant part 533 F.2d 1125 (9th Cir. 1976).

[14] Scott indicated in her statement to management that she, and not Shieldnight, had initiated their exchange about the Union by asking him "what's going on," and there is no indication that she was disciplined in any way.

[15] *Flamingo-Hilton-Laughlin*, 324 NLRB 72, 110 (1997); *Lamar Industrial Plastics*, supra at 513; *Greensboro News*, 272 NLRB 135, 138 (1995), enf. denied on other grounds 843 F.2d 795 (4th Cir. 1988); *W.W. Grainger*, supra at 161 fn. 2, 166–167.

night did not engage in solicitation, that he therefore did not violate the no-solicitation rule, and that his coaching for violating that rule was a violation of Section 8(a)(3) and (1).

3. The judge found that the Respondent also violated Section 8(a)(1) during Shieldnight's July 31 coaching session by unlawfully soliciting grievances and promising to remedy them. The Respondent contends that the meeting between Shieldnight and Managers Lamont and Hawkins was the sort of "run of the mill" conversation that the Respondent's management officials frequently have with associates under the Respondent's open door policy and was not unlawful. For the reasons set forth below, we reverse this 8(a)(1) finding.

Prior to the onset of any organizational efforts by the Union at the Respondent's store, the Respondent had an established practice of soliciting employee grievances under an open door policy that encourages employees to discuss their ideas, problems, and concerns directly with management. It is well established that an employer with a past practice of soliciting employee grievances through an open door or similar-type policy may continue such a policy during a union's organizational campaign. See, e.g., *Kingsboro Medical Group*, 270 NLRB 962, 963 (1984). It is also well-established that it is not the solicitation of grievances itself that violates the Act, but rather the employer's explicit or implicit promise to remedy the solicited grievances that impresses upon employees the notion that union representation is unnecessary. See *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000); *Uarco, Inc.*, 216 NLRB 1, 2 (1974). Thus, although there was a union organizing campaign taking place at the Respondent's store, the Respondent was entitled to utilize its established open door policy to solicit grievances so long as it did not expressly or implicitly promise to remedy these grievances.

During the coaching meeting with Lamont and Hawkins, Shieldnight, on his own volition, brought up several issues of concern regarding some of the Respondent's employment policies. For the most part, Lamont and Hawkins simply listened to Shieldnight's concerns and responded to any questions that Shieldnight asked them. At one point, Lamont asked Shieldnight to identify some of the issues he had mentioned that could be "resolved" for him. This remark must be analyzed in the context of the entire discussion with Shieldnight and against the background of the Respondent's established open door policy, of which Shieldnight was well aware. In this context, unlike the judge, we find that Lamont's remark could not reasonably be construed as a promise to remedy the issues that Shieldnight raised.

In fact, when Shieldnight responded to Lamont by raising the matter of paid health insurance, Lamont simply referred Shieldnight to the process of a "grass roots" meeting, through which the Respondent would respond to Shieldnight's concern only if it proved to be one of the top three issues identified on a companywide basis. When the meeting with Shieldnight ended, no further substantive action was promised by either Lamont or Hawkins. The three men merely agreed to meet again, but no subsequent meeting took place. Under these circumstances, we find that the evidence does not support the judge's finding that the Respondent violated Section 8(a)(1) by unlawfully soliciting grievances from Shieldnight and by promising to remedy them. Accordingly, we dismiss this allegation of the complaint.[16]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Wal-Mart Stores, Inc., Tahlequah, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c) and reletter the subsequent paragraphs.

2. Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its facility in Tahlequah, Oklahoma, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at is own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 29, 2001."

[16] In light of our finding that the Respondent did not violate the Act by unlawfully soliciting grievances from Shieldnight, we find it unnecessary to pass on the Respondent's alternative argument that any improper solicitation of grievances on its part was, at most, a *de minimis* violation of the Act.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., September 30, 2003

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to the judge and my colleagues, I find that a T-shirt which tells readers to ask the wearer how they can sign a union card constitutes solicitation. In addition, the employee (Shieldnight) engaged in other solicitation. Accordingly, the Respondent lawfully disciplined Shieldnight for violating the Respondent's no-solicitation policy.

The relevant facts are brief. On January 29,[1] off-duty employee Shieldnight wore a T-shirt in the Wal-Mart store in Tahlequah, Oklahoma that read "Union Teamsters" on the front and "Sign a card . . . Ask me how" on the back. On the night he wore the shirt to the store, Shieldnight engaged an on-duty employee in a discussion. When that employee was told by management to get back to work, Shieldnight asked the employee about an item for sale. The purpose of the inquiry was to continue the discussion. Respondent's managers forced Shieldnight to leave the Respondent's property.

Two nights later, Shieldnight spoke to three employees while he was on duty, asking each of them to attend union meetings, and asked one of them to sign a union card.

As a result of wearing the T-shirt and soliciting employees while Shieldnight was on duty (as well as those he solicited), the Respondent gave Shieldnight a coaching, i.e., a form of discipline.

In sum, in the instant case, employee Shieldnight engaged in three acts of solicitation. He wore a T-shirt asking employees to sign a union card; he orally asked an employee to sign a card; and he asked employees to attend a union meeting. These solicitations occurred on working time. The solicitor was therefore lawfully disciplined.

My colleagues say that the acts were not "solicitations." I disagree.

The term "solicitation" means the act of asking someone to do something. In the context of a union organizational campaign, it often means asking an employee to sign a tendered card. However, neither the cases nor common sense suggest that the term "solicitation" is confined to this act.[2]

The fact that a solicitation does not prompt a "physical response" does not mean that there is no solicitation. For example, an employee who asks another to sign a union card at some future time is nonetheless engaged in solicitation. For the same reason, the absence of a tendered card at the time of solicitation does not mean that there is no solicitation. Phrased differently, a solicitation is a solicitation even if the requested action will not occur immediately.[3]

Based on the above, Shieldnight was soliciting on working time and could lawfully be disciplined therefor.[4]

Dated, Washington, D.C., September 30, 2003

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[1] All dates refer to 2001, unless otherwise noted.

[2] More specifically, *W.W. Grainger,* 229 NLRB 161 (1977), which is cited by my colleagues, does not hold that the term is so confined.

[3] By contrast, mere speaking in favor of the union, or telling employees about a union meeting does not seek an action and therefore may not be solicitation. Hortatory words (i.e., words which strongly urge) may or may not be solicitations, depending on whether they urge an action to be taken.

[4] I agree that the admonition to Shieldnight was overly broad, in that the Respondent told him that he had to leave the Respondent's property. Under Board law, not here challenged, off-duty employees can engage in Sec. 7 activity on the exterior of an employer's property. *See Tri-County Medical Center,* 222 NLRB 1089 (1976). In addition, without necessarily agreeing with all of the elements of *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978), I find that the Respondent failed to cure this violation.

Choose not to engage in any of these protected activities

WE WILL NOT deny our employees access to our facility in order to discourage union activities by our employees.

WE WILL NOT issue disciplinary "coaching" warnings to our employees because they join or assist United Food and Commercial Workers Local Union 1000, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful "coaching" given to Brian Shieldnight, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the coaching will not be used against him in any way.

WAL-MART STORES, INC.

Stan Williams, Esq., for the General Counsel.
Thomas D. Robertson, Esq., for the Respondent.
James L. Hicks Jr., Esq., for the Union.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an interfering with employee rights and wrongful "coaching" case. At the close of a 2-day trial in Tahlequah, Oklahoma, on August 3, 2001, and after hearing oral argument by Government, Union, and company counsel, I issued a bench decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (the Board) Rules and Regulations setting forth findings of fact and conclusions of law. This certification of that Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (exceptions) to the Board.

For the reasons (including credibility determinations) stated by me on the record at the close of the trial, I found Wal-Mart Stores, Inc. (the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) when on or about February 2, 2001, it, acting through its supervisors and agents, denied employees' access to its facility, thereby discouraging union activities by its employees; and solicited employee complaints and grievances and promised to remedy such complaints and grievances if the employees refrained from supporting the United Food & Commercial Workers Local Union 1000 (the Union). I also concluded the Company violated Section 8(a)(1) and (3) of the Act when it issued a disciplinary "coaching" to its employee Brian Shieldnight on February 2, 2001, because he joined and assisted the Union. I concluded the Company failed to demonstrate it would have disciplined Shieldnight in the absence of his protected conduct. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), as clarified by *Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 267–268 (1994). I dismissed all other allegations in the complaint for lack of credible evidence in support thereof.

I certify the accuracy of the portion of the transcript, as corrected,[1] pages 396 to 421, containing my bench decision, and I attach a copy of that portion of the transcript,, as corrected, as "Appendix A."

CONCLUSION OF LAW

The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Company having issued a disciplinary "coaching" to its employee Brian Shieldnight, I recommend the Company be ordered to removed from its files any reference to the unlawful "coaching," and thereafter notify him in writing this has been done and that the unlawful "coaching" will not be used against him in any way. I also recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees," copies of which are attached as "Appendix B" for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these conclusions of law, and on the entire record, I issue the following recommended[2]

ORDER

The Company, Wal-Mart Stores, Inc., Tahlequah, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing disciplinary "coaching" warnings to employees because the employees join or support the Union, and to discourage employees from engaging in these activities.

(b) Denying employees access to its facility thereby discouraging union activities by its employees.

(c) Soliciting employee complaints and grievances and promising increased benefits and improved terms and condi-

[1] I have corrected the transcript pages containing my bench decision and the corrections are as reflected in attached appendix C [omitted from publication.]

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tions of employment if the employees refrain from supporting the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful "coaching" issued Brian Shieldnight, and within 3 days thereafter notify him in writing that this has been done and that the "coaching" will not be used against him in any way.

(b) Within 14 days after service by the Regional Director of Region 17 of the National Labor Relations Board, post at its Tahlequah, Oklahoma, facility, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 17 after being signed by the Respondent's authorized representative shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to employees, to all employees employed by the Respondent on or at any time since February 2, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 17 of the Board sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be, and is, dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C. August 27, 2001

BENCH DECISION

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JUDGE CATES: This is my decision in the matter of Wal-Mart Stores, Inc., hereinafter Company, Case 17–CA–21045–1[.]

First, I wish to thank the parties for the presentation of the evidence. If you will reflect back over the trial, I asked no questions during this proceeding and that reflects highly on the high level of competency of the counsel trying the case. Each of you are a credit to the party you represent and I thank you for the presentation of the evidence. It makes my job easier.

Let me also state that it has been a pleasure to be in Tahlequah, Oklahoma.

This is an unfair labor practice case prosecuted by the National Labor Relations Board's, hereinafter Board, General Counsel, hereinafter, Government Counsel, acting through the Regional Director for Region 17 of the Board following an investigation by Region 17's staff.

The Regional Director for Region 17 of the Board issued a Complaint and Notice of Hearing, hereinafter Complaint, on May 18th, 2001, based upon an unfair labor practice charge filed by United Food & Commercial Workers, Local Union 1000, hereinafter Union on February 2, 2001. The charge was amended on April 27, 2001.

Certain facts herein are admitted, stipulated, and/or undisputed.

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It is essential that I set forth certain of those facts at this point, which I shall now do.

It is admitted the Company is a corporation operating retail stores located throughout the United States, including a facility in Tahlequah, Oklahoma, the only store involved in these proceedings.

During the 12 month period ending March 31, 2001, a representative period, the Company purchased and received at its above-referencedlocation goods and materials valued in excess of $50,000.00 directly from suppliers located outside the State of Oklahoma and during the same period derived gross revenues in excess of $500,000.00.

The parties admit the evidences establishes and I find the Company has been at all times material herein and continues to be an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the National Labor Relations Act, as amended, hereinafter Act.

The parties admit and I so find the Union is a labor organization within the meaning of Section 2(5) of the Act.

The parties admit that Regional Vice President Joe Mains, Assistant Store Manager, John Lamont, Co-Manager Rick Hawkins, Labor Relations Manager Jim Johnson, and Regional PersonnelManager Sylvester Johnson are supervisors within the meaning of Section 2(11) and agents of the Company within the meaning of Section 2(13) of the Act.

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The specific contested Complaint allegations are that on January 1, 2001, the Company, by Vice President Mains, promised employees benefits, thereby discouraging union activities among its employees.

It is also alleged that the Company on or about January 27, 2001, by Assistant Store Manager Lamont, threatened employees with loss of benefits, with plant closure, with pay cuts, loss of promotional opportunities, and created the impression of surveillance of employees' protected, concerted, and union activities in order to dissuade employees from supporting the Union.

It is alleged that on or about January 27, 2001, the Company, by Co-Manager Hawkins, threatened employees with layoffs, discharge, loss of benefits, and with unspecified reprisals in order to dissuade the employees from supporting the Union.

It is also alleged that on or about January 29, 2001, the Company, by Assistant Store Manager Lamont, interrogated employees concerning their union activities and denied em-

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployees access to the Company's facility, thereby discouraging union activities by its employees.

It is further alleged that Assistant Store Manager Lamont, on or about February 2, 2001, interrogated employees concerning their union activities and solicited employee complaints, promised its employees increased benefits and improved terms and

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conditions of employment if they refrained from supporting the Union.

It is also alleged that the Company, by Co-Manager Hawkins, on or about February 2, 2001, solicited employee complaints and grievances, promised employees increased benefits and improved terms and conditions of employment if they refrained from supporting the Union and threatened employees with unspecified reprisals if they supported the Union.

It is alleged that the Company, be Labor Relations Manager Johnson, on or about February 2, 2001, threatened employees with unspecified reprisals if they supported the Union.

It is alleged the Company's actions, as I have just outlined, violated Sections 8(a)(1) of the Act.

It is alleged the Company issued a coaching to its employee Brian Shieldnight on February 2, 2001 because he joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities.

It is alleged the Company's actions regarding the issuance of the coaching violated Section 8(a)(3) of the Act.

The Company denies having violated the Act in any manner alleged in the Complaint.

This case, as in most cases, requires that I make credibility determinations. Stated differently, there are conflicts in the testimony; some minor, while others are more substantial.

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I'm not unmindful that, when witnesses are recalling the same events, they will recall them in a slightly different manner, with each believing, and, perhaps, rightly so, that they are truthfully recalling what occurred.

In arriving at my credibility determinations, I carefully observed the witnesses as they testified and have utilized such in arriving at the facts herein.

I have also considered each witness' testimony in relation to other witness' testimony and in light of the exhibit herein.

If there is any evidence that might seem to contradict the credited facts or the facts that I rely on, I have not ignored such evidence; but, rather, have discredited or rejected it as not being reliable or trustworthy.

I have considered the entire record in arriving at the facts herein.

As I will more fully explain hereinafter, I find and will find that the Company on January 29 denied an employee access to the Company's facility, thereby discouraging Union activities by its employees.

I will also find that the Company, through its representative, unlawfully solicited employee complaints and grievances on February 2, 2001.

I will also find that the Company unlawfully issued a coaching to employee Shieldnight on February 2, 2001.

I will dismiss all other Compliant allegations primarily

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based on credibility considerations.

The time frame for the releant facts in this case centers around late December, 2000 until early February, 2001.

The evidence indicates here was concern among both management and the employees, referred to in this proceeding as associates, concerning the very top level of management at the Tahlequah, Oklahoma Super Center Store, referred to herein sometimes as Store #10.

According to the testimony of Company Regional Manager Joe Mains, Store #10's manager, Mike Todd, was for personal reasons unable to devote the time to the management of the store that was necessary to operate a successful Super Store.

Regional Manager Mains testified Store #10 Co-Manager Brian Dodd attempted to carry as much of the store manager duties as possible, but could not cover them all and still perform his regularly assigned duties.

According to Regional Manager Mains, certain employees or associates were loyal to Co-Manager Dodd, while other employees were loyal to Store Manager Todd.

Regional Manager Mains, aware of the situation, determined to take the necessary corrective action to place Super Store #10 on the proper management course. Mains determined it was necessary to move both Store Manager Todd and Co-Manager Dodd to other locations within the Company, which he did.

Regional Manager Mains credibly testified he had no

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knowledge of any union action at Super Store #10 at the time he decided to transfer the manager and co-manager out.

Former employee Brian Shieldnight testified that, when Co-Manager Dodd was transferred out of Store #10 around the first of January, 2001, it upset a lot of associates, including himself.

It is undisputed that Regional Manager Mains came to the Tahlequah store and announced the changes; that is, the transfer out of Store Manager Todd and Co-Manager Dodd. The announcement was made to the employees or associates in the back of the store where meetings of this sort are normally held.

It is undisputed that, following the January 1, 2001 announcement by Regional Manager Mains, he and employee Shieldnight spoke about the transfers. There is, however, conflict regarding what the two said in their conversation on that occasion.

According to Shieldnight, he told Regional Manager Mains that Co-Manager Dodd took care of the employee/associates' problems, whereas Manager Todd did not because he was never at the store. Shieldnight said he told Regional Manager Mains that the open door policy was not working with Todd and, if something wasn't done, he wasn't scared to sign a union card. According to Shieldnight, Mains said he, Shieldnight, didn't need to do that. According to Shieldnight, Regional Manager Mains explained that he would hand pick a store manager and the open

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door policy would work again, that nobody wants a union at the store.

Regional Manager Mains testified employee/associate Shieldnight approached him after the announcement of the transfer of the store manager and was very upset. Mains testified that Shieldnight asked him are you some kind of nut, do you want a union in here. Shieldnight told Mains, according to Mains, you have taken out the best member of management you have, do you want to take care of things.

According to Mains, no mention was made of signing of union cards and he did not make any kind of promise, express, or implied, to Shieldnight. Mains specifically denied asking Shieldnight to put this matter on hold of manager change and that the open door policy would be taken care of.

Mains testified he made the management changes in the top level of management at Store #10 for the benefit of the associates and to start clean with new management that all of the associates would feel comfortable in giving their loyalty to.

It is alleged in Paragraph 5A of the Complaint that the Respondent, through Mains, promised employees benefits, thereby discouraging union activities by its employees. The government contends that the violation is that Mains promised that, if they would hold onto the situation for a little while and give him a chance to get his new manager in, that the open door policy

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would work again. The Company contends no such comments were made or took place.

Regional Manager Mains' version of the events I find to be more accurate. Regional Manager Mains' impressed me as a completely honest witness.

Shieldnight, on the other hand, did not. He was given to exaggerations. For example, in testifying about the number of managers that showed up in January at the store, he first referred to I think it was some 18 and could only name two. He spoke in terms of billions of people showing up. I found that he also rambled on beyond what was asked when responding to questions.

It appeared to me he was, at the cost of trying to explain away or justify his position, he would mold or shape facts favorable to himself.

In crediting Mains' testimony, I find he made no comments or promises to Shieldnight or any other employee that would violate the Act as alleged in Paragraph 5A of the Complaint.

Accordingly, I shall dismiss Paragraph 5A of the Complaint.

Employee Shieldnight testified that he contacted the Teamster Union around January the 23rd of 2001 and met in Muskogee, Oklahoma with one of the Teamster representatives, an individual named Van Allen. He explained to Van Allen his situations at the store, and Van Allen told him he would look

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into it and see whether he could handle it or not, that the Teamsters Union mostly involved truck drivers and employees of that nature.

Thereafter, employee Shieldnight testified he was notified that the Teamsters Union could not handle or would not handle the situation and the employees of the store. However, the United Food & Commercial Workers Union would and that an individual named Joe Price would help them.

On or about January 25th, 2001, Price, of the Union herein, and Van Allen, of the Teamsters, met with Shieldnight and approximately six other employees at a local fast food restaurant, initially, in Tahlequah,Oklahoma. Thereafter, the meeting moved, perhaps, to another restaurant.

At the meeting, Shieldnight testified that he and the six others signed union cards for the Union and became what he described as the organizing committee for the employees at the Store #10 in Tahlequah, Oklahoma.

Shieldnight testified that Union Business Agent Price gave him instructions that he was not to attempt to get cards signed on Company time.

Shieldnight testified that on January the 27th, 2001, he,along with the help of a fellow employee, Nick Larmon, were in the store on the first aisle near the pet section taping up some containers of bird seed, talking about the Union.

Shieldnight was not certain if Assistant Store Manager

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Lamont overheard what they were talking about or not. Shieldnight testified he attempted to mislead Assistant Store Manager Lamont by asking him to settle a discussion between he and employee Larmon.

Shieldnight testified he told Assistant Store Manager Lamont that employee Larmon was for the Union and asked what would happen if they signed a Union card. According to Shieldnight, Assistant Store Manager Lamont stated they would lose their bonuses, their discount cards, pay raises, the store would close down, and, if they signed a Union card, they would be signing their lives away.

According to Shieldnight, Assistant Store Manager Lamont told them to look at what happened to the meat department employees in Texas, that, after an episode of the union there, that the Company went to pre-wrapped meat. According to Shieldnight, there was a discussion of a 25 cent per hour raise and the dues that would be paid to the union and whether the employees would come out ahead.

Shieldnight testified that Assistant Store Manager Lamont talked about certain items that they needed to look into and that, as a result, the three of them went to the back of the store to get on the Company's pipeline or their Internet services so that they could have the questions that Lamont did not have the answers to responded to.

Employee Nick Larmon testified regarding the January 27

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meeting on the pet store aisle where he said he and Shieldnight were packaging bird seed and discussing what would happen if the Union came in. According to Larmon, Assistant Store Manager Lamont, said they would lose their bonus checks, they would take a pay cut, like the employees had at Homeland, a food store where Assistant Store Manager Lamont had previously worked.

Larmon added that Assistant Store Manager Lamont said they would lose their benefits and, if they ever went to an election, the store would close.

Larmon said they asked what their rights were and it was then that they went to he back of the store to get on the pipeline or the Company's Internet system to see what their rights were.

Larmon testified nothing was said about 25 cent an hour raise, union dues, or related matters.

Shieldnight testified that, after they got to the area where the computer was to get on the Company's pipeline or Internet services, that Nick Larmon left the area and another employee came into the area. Perhaps, Jay Griffith.

Shieldnight testified that Co-Manager Rick Hawkins came into the room and they talked about the Union. According to Shieldnight, Co-Manager Hawkins told him you don't want a union and added that, if you signed a union card, you were signing you life away. Shieldnight testified Co-Manager Hawkins said they would lose their discounts, their bonuses, and, if they got a

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raise, other employees would be laid off and the place would close down. According to Shieldnight, Co-Manager Hawkins said that, just because he, Shieldnight, signed a union card did not mean he was protected.

Shieldnight testified Hawkins told him to look long-term with the Company and added that, if one signed a union card and got fired, it would follow the employee to other jobs.

Shieldnight testified Hawkins told him you can go far with Wal-Mart and added don't sign a union card if you want to make big money.

Co-Manager Hawkins testified he was specifically trained in how to handle situations involving unions and Hawkins denied at any time making any of the comments attributed to him by Shieldnight.

Assistant Store Manager Lamont testified he was walking the store floors, as was his practice, on January the 27th and Shieldnight said to employee Larmon let's ask John about their conversation. According to Assistant Store Manager Lamont, Shieldnight said Larmon is interested in joining the union and added, if someone offers 25 cents per hour and loses their bonus, it looks like a pretty good trade-off to me, or that it sounded pretty good to him.

Assistant Store Manager Lamont testified he explained that, if the bonus came to $600.00—according to Lamont, it actually came to six hundred plus dollars—and the 25 cent per

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hour came to $520.00 for the year, that according to their, the two employees' scenario, it would not be that good.

Assistant Store Manager Lamont specifically denied making any comments about them losing their bonus or discounts. As to looking up the answers on the Company's pipeline or Internet system. in the back room they had small talk in which he, Lamont, told Shieldnight about his experiences in working at a unionized store in Muskogee, Oklahoma, Homeland Foods. Lamont spoke about his taking pay cuts at that store and the store closing anyway.

Lamont said he told Shieldnight the result of the shutdown of the store had nothing to do with the union, that no matter what a union said, it was ultimately up to the financial status of the company whether the employees kept their jobs or not.

Hawkins specifically denied saying that careers would be ruined if they signed union cards. Hawkins also specifically denied saying that, if one signed a union card, they would be signing their life away.

It is alleged in Paragraph 5B and C of the Complaint that on or about January 27, which would correspond with this conversation, that AssistantStore Manager Lamont threatened employees with loss of benefits, threatened employees with plant closure, threatened employees with layoff, created the impression of surveillance of employees' protected, concerted, and union activities, threatened employees with loss of

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promotional opportunities and threatened to cut employees' pay.

In Paragraph 5C it is alleged that in the second part of this conversation, the part taking place in the back of the store, that Hawkins threatened employees with layoffs, hreatened employees with discharge, threatened employees with unspecified reprisals, and threatened employees with loss of benefits.

Co-Manager Hawkins in his overall testimony impressed me as a careful, albeit somewhwat shy or reserved witness, who was attempting to testify truthfully to the best of his recollection. I credit his testimony.

After carefully observing Assistant Store Manager Lamont testify, I credit his testimony and, in doing so, I'm not unmindful that he had an opportunity to hear all of the testimony in the proceeding. For that matter, Shieldnight also had the opportunity to hear all of the testimony herein. And I'm not unmindful that Assistant Store Manager Lamont has a career and a pecuniary interest in the outcome of this proceeding.

However, I'm persuaded that he and Hawkins tesitfied truthfully with respect to what took place on January 27 and I find nothing either Co-Manager Hawkins or Assistant Store Manager Lamont said, as I've outliend above, to either Shieldnight or Larmon that violated the Act in any manner alleged in Paragraphs 5B and C of the Complaint.

Accordingly. I shall dismiss Paragraph 5B and Paragraph 5C

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in their entirety.

It is undisputed that on January the 29th, 2001, Shieldnight went to the store at approximately somewhere between 9:30 and 10:30 P. M. wearing a self-designed T-shirt that read on the front "Union Teamsters" and, on the back, "sign a card", "ask me how."

Shieldnight testified that he was accompanied by his, at that time, fiancee, Jennifer Pry, that they visited the store and were accompanied by another couple and that he also spoke to an individual at the store about, perhaps, purchasing a dog from the individual.

He testified that, while he was in the store with the T-shirt on, that Assistant Store Manager Lamont came up to him and said what's up with that, looking at the T-shirt. He testified

that he believed he was followed around the store by Assistant Store Manager Lamont, as well as another manager, Tammy Flute.

Shieldnight testified that, as he was talking in the store with both customers, other customers, and employees or associates, that he was told by Assistant Store Manager Lamont that he could not remain in the store, that he was asked to leave the store and was told, in leaving the store, that he would need to remove himself from the property of Wal-Mart out to the point where a traffic light was located at the entrance to the public street.

Night Assistant Manager Flute testified that she was in the

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store on the night of January the 29th and observed Shieldnight with a T-shirt on that I have earlier described and That she had noticed him speaking to one of the associates and she told the associate, "Zach, you need to get back to work", and that she then asked Assistant Store Manager Lamont, who happened to be in the store that particular evening, what should be done about the T-shirt and about Shieldnight.

She testified that a phone call was made to the store hot line and it was determined that Shieldnight should be removed from the store. She testified that Assistant Store Manager Lamont followed Shieldnight to the door and that he walked out at that point.

Assistant Store Manager Lamont testified that he and Assistant Store Manager Flute saw Shieldnight wearing the T-shirt with the comments indicated and that he approached Shieldnight and told him that he would have to leave the associates alone and at that point he said that Shieldnight asked one of the associates to talk to him or tell him about the treadmill, a piece of sporting equipment that was there, so that they could continue talking.

Assistant Store Manager Lamont testified that he ascertained what should be done and was told that the individual should be removed from the store and that he removed him from the store and ordered him to leave the property. He testified that the next day or the following day he informed Shieldnight

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that he had exceeded his authority, that it wasn't right what he had done, and he didn't really have to leave the property.

Assistant Store Manager Lamont denied asking Shieldnight what the shirt was. He said he was able to see the shirt, both front and back.

It is alleged in Paragraph 5D of the Complaint that the action by Assistant Store Manager Lamont constituted interrogation and denying the employee access to the Respondent's facility, thereby discouraging union activities by its employees.

Based on a credibility determination, I conclude that Assistant Store Manager Lamont did not ask what about the T-shirt, and, as such, I shall dismiss Paragraph 5B(i) that he engaged in any interrogation.

I find that the Company did violate the Act when it denied Shieldnight access to its store while wearing the T-shirt in question. The T-shirt in question, in my opinion, does not constitute a solicitation in such a manner that the shirt could not legitimately be worn in the store. I find that the removal of the employee from the store, as well as from the property, violated the Act.

I find that the Company must be ordered to correct that wrong in the form of a posted notice because I am fully persuaded that, although Assistant Store Manager Lamont attempted to correct the problem the next day, as he perceived

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it, that the retraction or admission was insufficient to cure the violation.

I'm fully convinced that others in the store saw what took place and I'm fully persuaded that others inquired about what had happened. Even among others, Assistant Store Manager Lamont said that he was asked about what transpired.

So, with that, I find that the Company has violated the Act, as alleged, and that it must post a notice to rectify the actions it took with respect to the denial of Shieldnight to the store, as well as outside the store. And, as to outside the store, I think it's very clear because the evidence indicates that the store allowed Santa Claus to be outside the store, they allowed Girl Scouts to sell cookies outside the store, they allowed fraternities and sororities, perhaps. So they can't disparately pick out the union solicitation and say we're going to preclude it while at the same time they are allowing these other activities to take place.It is undisputed that on February 2, 2001, employee Shieldnight was given a coaching.

Perhaps, I should explain briefly what a coaching constitutes in this case. The company has a disciplinary procedure that it calls coaching for improvement and coachings are, as the parties agreed at the beginning of the trial, a form of discipline. They move through oral coachings to written coaching to coaching for improvement and, perhaps, at some point

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you reach decision day and whether you want to be with this Company or whether this Company wants you with them.

Employee Shieldnight testified that he had been solicited to come to the back of the store to the offices on February the 2nd, but, apparently, he failed to overhear the announcement that he come back, so some fellow employee informed him that he needed to go see management in the back of the store.

So he proceeded to do just that and, when he got there, he saw Assistant Store Manager Lamont and Co-Manager Hawkins and he asked them what's this about, am I getting fired, and they invited him in and he said he wanted to have his Weingarden rights enforced, that he wanted someone to be present with him, and he said that they told him to come on in, that they were not going to give him his Weingarden rights, and that they gave him a written coaching for improvement form.

He testified that the writing on it, other than what he wrote himself, he believed was filled out, perhaps, except for he thought maybe he was asked for his social security number or some related information.

He had an opportunity to read the coaching for improvement and said that he wasn't going to sign it, that he did not agree with it, that he had never solicited any employees on the clock

and that he simply did not agree with it and the two managers informed him that he could put down on the form itself that he

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did not agree with it and state his position and Shieldnight testified that he did just that and that he wrote on it, that is the coaching improvement form: I do not agree! I have never solicited anybody on the clock. I did not agree with leaving the premises, but I did not argue. And then he put his initials.

The Company, through Assistant Store Manager Lamont, testified that Shieldnight was not entitled to any witness within the meaning of Weingarden because they were not attempting to investigate the situation involving Mr. Shieldnight, but was merely there to give Mr. Shieldnight the discipline outlined on the coaching for improvement form.

The reason stated on the form for the giving of the coaching to Shieldnight was that on January the 29th Shieldnight was in the Tahlequah store and he was observed soliciting inside the store and was asked to leave and then, further, it says that on January the 30th, 2001, Shieldnight was observed soliciting while on working time and that it was clearly against Company policy and that they would not tolerate it and he was disciplined accordingly.

The Company presented three witnesses who testified that they were solicited while on the clock by Shieldnight on January the 30th. Those three witnesses were Patricia Scott, James Parsons, and Debra Starr.

Starr indicated, for example, that Shieldnight asked her

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to come to a meeting later that night at his home so the Union representatives could talk with her and that he would like for her to sign a card. She testified that they were on the clock at the time.

Parsons testified that he, likewise, was on the clock when Shieldnight told him there was a meeting that night at the Holiday Inn and that he should be there and you can hear the other side of the story.

Scott testified that she asked him about what was going on because a number of the store managers had been at the Holiday Inn for a meeting that day, and that he told her it was all about the Union and that he was the one that had called the Union, and, if she wanted to go to a meeting that evening, she could do so and hear the other side of the story.

It is on the basis of those three employees' statements to the Company, as testified to in this proceeding, that caused the Company to issue the coaching that it did.

I'm persuaded fully that the three employees were approached by Shieldnight, as they testified, and that was one of the most troubling aspects of the credibility resolutions in this case because Shieldnight specifically denied speaking to any one of those three and, to credit Shieldnight on that, I would have to discredit these other three witnesses, who, at least, two of them appeared to have no outside motive or ax to grind in any manner for saying that this took place.

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So I find that Shieldnight did, in fact, solicit these three employees and that he did so on Company time and that they were not of such a minimal contact that they should not be looked at.

But the Company not only based its discipline on those three comments, but inextricably intertwined with the discipline is the removal of Shieldnight from the store on January the 29th and removing him from the property also on that same occasion.

I cannot divide the coaching and find that part of it was valid and part of it was invalid, because the Company didn't do that. They put it on both accounts.

So I am persuaded that the Company unlawfully disciplined Shieldnight as alleged in Paragraph 6 of the Complaint when it issued the coaching that it did to him on February the 2nd and I shall order that they remove the coaching from his file, notify him in writing that this has been done and that it will not be used against him in any future references or any attempts at reemployment with the Wal-Mart Stores, Inc.

Now, having found that, I need to go further into the conversation that took place after the coaching was issued.

The three gentlemen spoke for approximately an hour after the discipline was issued and they covered a large variety of matters that you might expect the three parties to discuss. They talked about working conditions. They talked about what

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had taken place in the store. And I find that Assistant Store Manager Lamont, after listening for a long period of time as to what had transpired at the store and what was happening, that he asked Shieldnight, along with Co-Manager Hawkins, what it was he wanted, what it would take to satisfy him, what were his complaints so they could address them and, in the context of this case and in the context of administering an unlawfully motivated disciplinary warning, I find that they cannot do that lawfully.

When they were soliciting what his complaints were, implied therewith, if not expressly stated, was that the grievances and complaints would be taken care of and, as such, it would tend to coerce and intimidate the employee into moving away from union activities, and, as such, violates the Act and I so find and I shall order that the Company post a notice correcting that.

I am not persuaded based on credibility resolutions, however, that there was any interrogation in the hour long meeting, which I shall not set forth in detail.

Now, looking at all of that, including the comments that took place after the discipline was issued, would the Company have issued the discipline in the absence of any union or protected activity on the part of Shieldnight?

I'm fully persuaded that the evidence clearly establishes that the Company failed to demonstrate such. That is, they

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disciplined Shieldnight, in part, for his activity on January the 29th and the activity on January the 29th, clearly, was unlawful under the Act. Therefore, the Company has failed to meet any defense that it was required to meet in order to prevail in this proceeding.

I shall dismiss those portions of Paragraphs 5E and L of the Complaint that refer to interrogating employees or threatening employees with unspecified reprisals.

As I indicated, I will find that the Company solicited employee complaints and grievances and impliedly promised to correct them.

I shall dismiss Paragraph 5G of the Complaint because I have already done so initially during the trial because there was no testimony presented that would support the allegations set forth in that paragraph of the Complaint.

I denied, and correctly so, the General Counsel's motion to change that Complaint paragraph after the evidence was presented, saying that it was a typographical or mislabeling of who was involved.

Now the court reporter in due time, and in due time normally means ten days, will serve on me a copy of the transcript of this proceeding. At that point, I will make, if necessary, any corrections to the transcript and certify the transcript to the Board as my decision.

It is my understanding that the appeal period for any

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exceptions runs from my certifying my decision to the Board. However, I would invite you not to rely on my understanding, but to follow the Board's Rules and Regulations. Should anyone wish to appeal any part of the decision or part of it, they may do so at that time.

What I normally do is I take the transcript and for typos or other matters, I correct the transcript. My office reprints the transcript in corrected form.

I attach a attachment to the decision setting forth precisely what corrections have been made on what page, line, and word, so that anyone can clearly see what it is that has been corrected. I have not had a decision yet that did not require some correction of the transcript.

I will also attach thereto the notice that is to be posted and I will also set forth in the remedy that the disciplinary coaching that was issued is to be removed and that Shieldnight is to be notified that such as been done.

Let me state that it has been a pleasure hearing this case and,with that, the hearing is closed.

(Whereupon, at 10:20 A. M., the hearing in the above-entitled matter was closed.)

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid and protection
To choose not to engage in any of these concerted activities

WE WILL NOT deny our employees access to our facility in order to discourage union activities by our employees.

WE WILL NOT solicit employee complaints and grievances and promise increased benefits and improved terms and conditions of employment if our employees refrain from supporting United Food & Commercial Workers Local Union 1000, or any other labor organization.

WE WILL NOT issue disciplinary "coaching" warnings to our employees because they join or assist the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful "coaching" given to Brian Shieldnight, and WE WILL, within 3 days thereafter notify him in writing that this has been done and that the coaching will not be used against him in any way.

WAL-MART STORES, INC.